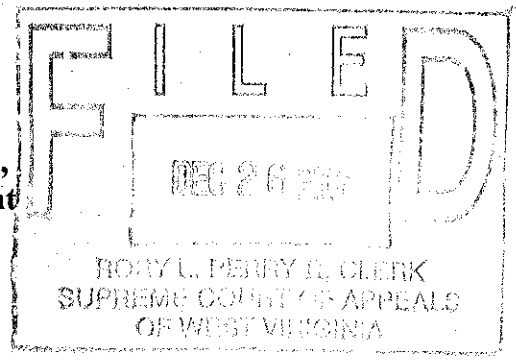
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 33666



BRENDA L. STANLEY,
Plaintiff Below, Appellant

vs.

SUTHIPAN CHEVATHANARAT, M.D.
Defendant Below, Respondent

BRIEF OF APPELLEE SUTHIPAN CHEVATHANARAT, M.D.

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KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

Appellant, Brenda Stanley, filed a medical malpractice action against Respondent Suthipan Chevathanarat, M.D. ("Dr. Chevy") in the Circuit Court of Logan County, West Virginia on January 27, 2000. Appellant alleged that Dr. Chevy breached the standard of care regarding a total abdominal hysterectomy with bilateral salpingooophorectomy ("TAH") that Dr. Chevy performed upon Appellant on July 20, 1998.

A prior Logan County Circuit Court jury, properly empanelled and properly charged before Judge Roger Perry, found in favor of Dr. Chevy on July 17, 2003, on all other issues as to the standard of care (including the necessity of the surgery, the technical performance of the surgery, and the post operative care of the Appellant by Dr. Chevy) *except* the issue of informed consent, which was subject to a motion by Dr. Chevy pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure*. Judge Perry ruled in favor of Dr. Chevy's Rule 50 motion, and thus the issue of informed consent was not considered by the jury when it returned its verdict in favor of Dr. Chevy on July 17, 2003.

Following the 2003 verdict in favor of Dr. Chevy, Appellant filed a post-trial motion requesting judgment notwithstanding the verdict and requesting a new trial. The post-trial motion was heard by Judge Eric O'Briant because of a post-trial conflict concerning Judge Perry and Appellant relating to the sale of certain property. Judge O'Briant granted Appellant's post-trial motion as to the informed consent issue *only*. Judge O'Briant upheld the jury's verdict as it related to all other issues, e.g., the standard of care.

On November 1, 2005, a second jury trial began before Judge O'Briant wherein another properly empanelled and properly charged jury considered only the issue of informed consent.

Appellant alleged that she had not been informed of the alternatives to surgery or the risks of having the surgery.

At the close of evidence, Judge O'Briant heard Rule 50 motions by both Appellant and Dr. Chevy. Judge O'Briant denied both Appellant's and Dr. Chevy's Rule 50 motions on November 2, 2005.

The jury was then properly instructed regarding, *inter alia*, the legal requirements for a claim relating to informed consent. After approximately seven (7) hours of deliberations on the sole issue of informed consent, the jury returned the following verdict in Dr. Chevy's favor on Thursday, November 3, 2005:

> 1. Do you find from a preponderance of the evidence that the Defendant, Dr. Chevy, failed to obtain informed consent for the total abdominal hysterectomy performed on Brenda Stanley?
>
> _____ Yes _____X____ NO

The jury verdict form was given to the jury by agreement of the parties. It was signed by Edward Woods, the foreperson. Each individual juror was polled and agreed that their verdict was unanimous. Thereupon, the jury was discharged from further service. Based on the jury's verdict, the trial court ordered that the jury verdict be entered in favor of the defendant.

Following the 2005 verdict in favor of Dr. Chevy, Appellant again filed a post-trial motion for judgment as a matter of law and requested a new trial on the issue of causation. The Circuit Court of Logan County denied Appellant's motion by Order entered on December 1, 2006.

On March 29, 2007, Appellant filed in this Court a petition to appeal the Circuit Court of Logan County's decision not to grant Appellant's motion for judgment as a matter of law and

request for a new trial on the issue of causation. This Court granted Appellants petition on October 30, 2007, and Dr. Chevy timely files his Appellee Brief in response to Appellant's Brief.

STATEMENT OF FACTS

The Appellant would have this Court believe that there was never a factual dispute at the trial of this matter concerning whether a valid informed consent was obtained by Dr. Chevy. Appellant argues that Dr. Chevy did not present sufficient evidence to "allow the Jury to even *infer*" that he met the standard of care in his treatment of Appellant. *Appellant's Brief,* pg. 18. However, after an objective review of the trial transcript in its entirety, it stretches the bounds of logic and reason to believe there was no genuine factual dispute at the trial of this matter as to whether Dr. Chevy obtained informed consent from the Appellant to perform surgery.

The sole issue at the second trial of this matter in November of 2005 was whether Dr. Chevy met the standard of care in obtaining informed consent from Appellant to perform a total abdominal hysterectomy. Specifically, Appellant's evidence at trial focused on whether Dr. Chevy properly disclosed to Appellant 1) the risks involved concerning the surgery and 2) the alternative methods of treatment. To better understand the informed consent issue in this matter, one must be aware of the prior treatment Appellant received from Dr. Chevy and her previous gynecologist in the years leading up to the surgical procedure performed by Dr. Chevy.

Ms. Stanley became menopausal in her late thirties. In the early 1990s, she began to treat with Rodney Stephens, M.D., a gynecologist who managed her hormone replacement therapy ("HRT").[1] HRT was intended to offset the symptoms of menopause by introducing a hormone into the body that would replace the hormones lost in menopause. Although Ms. Stanley was

[1] Hormone replacement therapy was the standard of care in treating patients like the Appellant in the 1980s and 1990s, particularly those women who were menopausal. It was only in the early 2000s that this therapy came under heightened scrutiny due to alleged increases in heart disease and other diseases by women who took this therapy. There was no criticism of either Dr. Chevy or any other physician for prescribing this medication to the Appellant.

receiving HRT, she continued to have vaginal bleeding. In an attempt to diagnose the cause of Appellant's bleeding, Dr. Stephens performed two different gynecologic procedures in 1990 and 1993. In both instances, Appellant signed informed consent forms that were very similar to the informed consent form Appellant signed in the instant matter.

In 1995, Appellant began treating with Dr. Chevy for the purpose of controlling her vaginal bleeding. In an attempt to prevent such bleeding, Dr. Chevy manipulated her HRT regimen. Dr. Chevy also performed tests to diagnose the cause of Appellant's complaints, including dilatation and curettage ("D and C") procedures. Appellant also signed consent forms that were similar to the consent form Appellant signed in the instant matter when she agreed to undergo the D and C procedures.

During the continued treatment of Appellant by Dr. Chevy, a fibroid tumor was found on an ultrasound study ordered by Dr. Chevy prior to the subject surgery.[2] As Appellant indicated in her trial testimony, Dr. Chevy believed the fibroid was the source of the bleeding. *Stanley Trial Testimony*, November 2, pg. 89. After discussing the results of the ultrasound study with Dr. Chevy, Appellant consented to have the surgery. Appellant testified to the following on direct examination:

> Q. Maybe the question that's on everybody's mind is why did you agree to sign that document and then ultimately to submit to the total abdominal hysterectomy?
>
> A. I was told I had a tumor.

Stanley Trial Testimony, November 2, pg. 95.

[2] It was later determined, based on the pathologic examination of the uterus, that no such tumor was actually in the uterus. This was a "misread" by the Logan General Hospital radiologist who interpreted the ultrasound. No criticism was rendered against Dr. Chevy for relying on this interpretation in his decision to offer surgery to Brenda Stanley. It is undisputed that Dr. Chevy was in no way responsible for performing or interpreting the ultrasound.

Appellant signed the informed consent document on June19, 1998, during an office visit. The informed consent document detailed the risks of the surgery to be performed and the alternative treatments to surgery. *See Informed Consent Form*, attached as Exhibit 1. Appellant admitted at trial that she read the document, understood the document, and signed the document based on her prior discussion with Dr. Chevy:

Q. And with respect to this consent form, you agree that you read the form. Correct?

A. Yes, I did.

Q. Now as I understand your testimony, your recollection is that you had a discussion with Dr. Chevy on June 3rd, but you came back in and signed this on June 19th. Correct?

A. Yes, true.

Q. And you read through this form. Correct?

A. Yes.

Q. And you signed this form on June 19th. Correct?

A. Yes. I understood that to be what we had talked about June 3rd.

Stanley Trial Testimony, November 2, pp. 124-125.

It is important to note that Appellant's expert witness, Dr. Dein, had no criticisms of the informed consent document or its contents. Appellant's expert witness testified as follows:

Q. Let me ask you, first of all, is there anything wrong or what you believe that falls below the standard of care with this form in and of itself?

A. Not at all.

Q. So the subject matter of the typewritten information on this from is sufficient.

A. Yes.

Dr. Dein Trial Testimony, November 2, pg. 62-63.

Dr. Dein's testimony was supported by Dr. Chevy's expert witness, Dr. March, who testified:

> Q. Doctor, I want to talk to you about this consent form. Again, noting that you were here for Dr. Dein's testimony, is this a consent form that is typically seen in the hospital setting for these types of patients like Ms. Stanley?
>
> A. Probably actually at least in Los Angeles with the handwritten information, it is more extensive.
>
> Q. This is more extensive than what you typically have?
>
> A. Yes, sir.
>
> Q. And you heard Dr. Dein testify that he has no quarrel or any criticisms of this form.
>
> A. Yes, sir.
>
> Q. Likewise you have none as well.
>
> A. No, sir.

Dr. March Trial Testimony, November 2, pg. 141.

Dr. Chevy has no recollection of meeting with Appellant on June 3, 1998, and contrary to what is alleged in the Appellant's Brief, Dr. Chevy testified multiple times during trial that his normal practice is to discuss the risks and alternatives of surgery with his patients.[3] Dr. Chevy also testified that he would have discussed the risks of surgery and the alternatives to surgery with the Appellant herself. Specifically, Dr. Chevy testified:

> Q. It [the consent form] does not describe the accepted risk of a ureterovaginal fistula, does it?
>
> A. No, but you have to know this, too. The bladder is what lay people know (sic). The ureter, how many people would know, so when we talk, *I*

[3] It is important to note that Appellant alleges the trial court erred in its recollection of this testimony, i.e., that Dr. Chevy never testified as to the issue of how he gains consent in his normal, customary practice. Appellant claims that, after a thorough review of the trial transcript, there is no testimony regarding Dr. Chevy's normal, customary practice. The testimony cited *supra* overwhelmingly contradicts Appellant's assertion.

usually talk more than just writing. Talking is faster. You get more information, but you can't put everything in writing.

Dr. Chevy Trial Testimony, November 1, pg. 244-245. (Emphasis added).

Q. You've been performing surgery since 1974. Correct?

A. Yes.

Q. *And when you meet with your patients, do you discuss each of these points in the consent form*?

A. *Yes.*

Q. Why do you do that?

A. Because the patient needs to know what they go through, so I tell them everything whenever possible.

Dr. Chevy Trial Testimony, November 1, pg. 267-268. (Emphasis added).

Q. Dr. Chevy, when you obtain informed consent from your patients, *is it your habit and routine practice to go through this informed consent sheet with all your patients*?

A. *Yes.*

Q. Do you believe you did that with Mrs. Stanley?

A. Yes, I do.

Dr. Chevy Trial Testimony, November 1, pg. 272-273. (Emphasis added).

Q. Dr. Chevy, Ms. Stanley visited your office on a number of occasions. Correct?

A. Yes.

Q. Seeking treatment. Do you believe in your treatment of her that you answered questions that she may have asked you about her care and treatment?

A. Yes.

Q. In looking at this consent form, is it the same consent form or similar consent form that you use in all patients undergoing total abdominal hysterectomy?

A. *Yes, all of them have the same consent.*

Dr. Chevy Trial Testimony, November 1, pg. 274. (Emphasis added).

Although it was not an issue before the jury, Appellant's expert testified that he had no criticisms of Dr. Chevy regarding his care and treatment of Appellant with respect to his manipulation of her HRT program. Dr. Dein stated as follows:

Q. It's true, isn't it, Doctor, that it is not your opinion and you're not going to tell this jury that you believe that Dr. Chevy did anything wrong or deviated from the accepted standard of care relating to what the types of therapy that he prescribed and the amounts that he prescribed up to the point where he performed the surgery?

A. That's correct.

Q. What he did was appropriate. Correct?

A. Yes.

Dr. Dein Trial Testimony, November 2, pg. 57-58.

Likewise, plaintiff's expert had no criticisms of Dr. Chevy for offering Mrs. Stanley surgery as an option to control her vaginal bleeding. In addition, there are no criticisms that Dr. Chevy breached the standard of care in his performance of the surgery.

The true factual dispute in this case rested almost entirely on the issue of hormone replacement therapy (a regimen on which Ms. Stanley had been for years). The following colloquy between counsel for Dr. Chevy and Dr. Chevy's expert witness, Dr. March, specifically (and explicitly) details the stark factual dispute presented for the jury's consideration. Dr. March was adamant in testifying that Dr. Chevy was within the standard of care regarding alternative treatments and risks, especially as to hormone replacement therapy. Dr. March stated:

Q. Dr. Dein, however, in his testimony, Dr. March, criticized the alternative risks issue in his case, and you were here to hear that testimony.

A. Yes, sir.

Q. *Do you agree with Dr. Dein that Dr. Chevy deviated or broke from the standard of care with respect to this issue on hormone replacement therapy?*

A. *Absolutely not.*

. . . .

Q. You heard Dr. Dein's testimony regarding what he would have offered in terms of an alternative. Correct?

A. Yes.

Q. And I believe it was, and correct me if I'm wrong, Doctor, keeping her on the hormone replacement therapy for another three months.

A. Right.

Q. Is that correct?

A. Yes.

Q. *What are your opinions regarding that criticism?*

A. *Medical literature*[4] *would not support it, although he certainly is correct when he says you do a fresh start...or a fresh juggle of hormone replacement therapy, that let's give it a run for about three months...but when you focus on this person [the Appellant, Brenda Stanley], D & C today, went back on some hormones and was still bleeding, it doesn't apply. It's wrong. It's just wrong.*

. . . .

Q. Dr. Dein testified earlier today that a continuation or a manipulation or juggling of her hormone replacement therapy, the Premarin and the Provera, was a reasonable and a viable alternative to the surgery. You heard that.

---

[4] Dr. March specifically referenced studies performed by Drs. Neilson and Rivoe in Sweden which showed that, in women who have undergone D & C procedures after being on HRT, continuation of HRT is not an appropriate therapy. *Dr. March Trial Testimony*, November 2, pg. 156.

A. That was his, I heard that, yes.

Q. And you'd agree. Correct? I mean, that's a viable alternative.

A. Well, I think that the, I'm not really sure how extensive those viable, what alternatives were very, very viable, and *I think that that's where I would say that Dr. Dein was not correct.*

Dr. March Trial Testimony, November 2, pg. 144, 155-156, 161-162. (Emphasis added).

Finally, the jury was presented with testimony from Dr. March who testified that Dr. Chevy supplied proper informed consent to the Appellant and that Dr. Chevy thus had acted within the standard of care:

Q. Is it your opinion to a reasonable degree of medical certainty that this informed consent form was appropriate?

A. Yes.

Q. And is it your opinion likewise to a reasonable degree of medical certainty that Dr. Chevy met the standard of care in all respects with regard to informed consent?

A. Yes, sir.

Dr. March Trial Testimony, November 2, pg. 156

Thus, it would be incorrect to argue that there was no genuine factual dispute as to whether Dr. Chevy obtained an informed consent from Appellant. The jury heard evidence from the Appellant and her expert regarding how Dr. Chevy allegedly breached the standard of care with respect to obtaining informed consent. The jury also received evidence presented by Dr. Chevy regarding the actual informed consent document signed by the Appellant, and Dr. Chevy's normal course of practice in explaining the risks of surgery and alternatives to surgery. Additionally, the jury listened to evidence from the Appellant herself admitting that she had a discussion with Dr. Chevy regarding the surgery, read the consent form, and signed it. Finally,

the jury was presented evidence by Dr. March supporting Dr. Chevy's treatment and care. After deliberating for approximately seven (7) hours on the sole issue of informed consent, the jury resolved this factual dispute and returned a verdict in favor of Dr. Chevy.

LEGAL ARGUMENT AND AUTHORITY

I. STANDARD OF REVIEW.

The denial of a motion for judgment as a matter of law made pursuant to Rule 50(a) of the *West Virginia Rules of Civil Procedure* is reviewed *de novo*. *Yates v. University of West Virginia Board of Trustees*, 209 W.Va. 487, 493, 549 S.E.2d 681, 687 (2001); citing *Adkins v. Chevron, USA, Inc.*, 199 W.Va. 518, 522, 485 S.E.2d 687, 691 (1997). "[J]udgment as a matter of law should be granted at the close of evidence when, after considering the evidence in the light most favorable to the nonmovant, only one reasonable verdict is possible." *Yates*, 209 W.Va. at 493; citing *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 481 n. 6, 457 S.E.2d 152, 158 n. 6 (1995). "In addition, '[u]pon a motion for [judgment as a matter of law], all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed.'" *Yates*, 209 W.Va. at 493; quoting Syl. pt. 5, *Wager v. Sine*, 157 W.Va. 391, 201 S.E.2d 260 (1973).

In *Yates*, a patient and her spouse brought a medical malpractice action against the University of West Virginia Board of Trustees. The plaintiffs' theory was that the patient's physicians were tardy in their treatment of her right iliac artery, and this tardiness resulted in the amputation of the patient's right leg below the knee. *Yates*, 209 W.Va. at 491. After a five-day trial, the jury returned a verdict for the defendant. *Id.* at 492. On appeal, the plaintiffs argued that the trial court erred in denying their motions for a judgment as a matter of law at the close of evidence. *Id.* at 493.

In *Yates*, the Court found that the evidence presented at trial by the defense was sufficient to support the jury's verdict. *Id.* at 494. Specifically, the *Yates* Court concluded there was sufficient factual evidence and expert testimony presented whether treatment performed by the patient's physicians breached the standard of care. *Id.* at 493-494. Therefore, the *Yates* Court concluded, "[i]n light of the evidence and resolving all doubts and inferences in favor of the appellee, we do not believe that only one reasonable verdict was possible." *Id.* at 494. The *Yates* Court went on to provide that the jury merely "found the evidence presented by the defendant more credible, and concluded that [the physicians] were not negligent." *Id.* at 494. This is the identical legal context in which the instant case arises: conflicting testimony from both the parties and their respective experts was heard by the jury, which ultimately found for the defendant physician.

II. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW.

A. Appellant Is Incorrect in Alleging that Dr. Chevy Never Testified About His Normal, Customary Practice to Discuss the Contents of the Informed Consent Document With His Patients.

The only issue at the second trial of this matter was whether Dr. Chevy obtained informed consent from Appellant to perform a total abdominal hysterectomy. In order for a physician to obtain informed consent from a patient when offering surgery as a treatment option, the physician "should disclose to the patient various considerations including (1) the possibility of the surgery, (2) the risks involved concerning the surgery, (3) alternative methods of treatment, (4) the risks relating to such alternative methods of treatment and (5) the results likely to occur if the patient remains untreated." Syl. Pt. 2, *Cross v. Trapp*, 170 W.Va. 459, 294 S.E.2d 446 (1982).

Appellant's sole argument is that the jury's decision should be taken away because Dr. Chevy allegedly failed to meet the third element of the *Cross v. Trapp* test by not informing the Appellant of alternative methods of treatment. Specifically, Appellant alleges that:

> [T]he trial court's decision to deny Judgment as a Matter of Law should be reversed and this matter remanded accompanied by an Order that the issue of negligence be entered in favor of the plaintiff and a new trial on causation and damages ensue. This is because it is proven that Dr. Chevy failed to obtain informed consent from Brenda Stanley because he did not discuss (or otherwise provide information to her) the alternative method of treatment of HRT, a method of treatment that both experts testified was necessary to be imparted to her, and which is required under the *Cross* guidelines.

Appellant's Brief, pg. 20. Appellant bases her allegation that Dr. Chevy did not discuss HRT as an alternative treatment to surgery on her own testimony and an "alleged" admission by Dr. Chevy during trial. As will be shown *supra*, no such "admission" was adduced at trial.

To further her argument that Dr. Chevy failed discuss HRT with her, Appellant also argues that the trial court erred in its recollection of Dr. Chevy's trial testimony regarding Dr. Chevy's normal, customary practice to discuss all points contained in the informed consent document, which was presented at trial. *Appellant's Brief*, pg. 22. Appellant baldly states that "[a] detailed review of Dr. Chevy's testimony contains no testimony about Dr. Chevy's normal, customary practice." *Appellant's Brief*, pg. 22.

Dr. Chevy candidly admitted at trial that he had no distinct recollection of his discussions of the consent form with Appellant because it had been, at the time of trial, over seven years since the surgery. *Dr. Chevy Trial Testimony*, November 1, pg. 267. However, contrary to Appellant's allegations that the trial court erred in its recollection of the trial testimony, the trial transcript shows Dr. Chevy presented sufficient evidence that it was his normal and customary practice to discuss each of the points set out in the consent form, including risks of surgery, the alternatives of surgery, and the risks of the alternatives of not having surgery. *Dr. Chevy Trial*

Testimony, November 1, pg. 267-268, 272-273, and 274. Dr. Chevy further testified that if Appellant did not have the surgery, her continued course of treatment would be to either "quit taking the hormone or continue taking hormone and take the bleeding again." *Dr. Chevy Trial Testimony*, November 1, pg. 271. This made perfect sense in the context of Appellant's lengthy treatment for her post menopausal problems: at the time of her surgery, she had been on various forms and dosages of HRT for over five years. Should she not choose surgery, it was evident that she would continue with the therapy.

Thus, the jury was presented with testimony from Dr. Chevy that, having a custom and practice of discussing all points of the consent form with his patients, he presented the Appellant with these alternatives. The jury could thus determine that informed consent was obtained by Dr. Chevy before performing the surgery. Indeed, it is axiomatic that a patient, who has been on HRT for a significant number of years, should that patient decline surgery, would continue on that drug regimen as part of her ongoing course of treatment. This issue was obviously not discarded by the jury in arriving at its verdict in favor of Dr. Chevy.

B. Appellant is Incorrect in Alleging That Dr. Chevy Never Offered HRT as an Alternative to Surgery.

The focus of the Appellant's experts' criticisms of Dr. Chevy was the alleged failure by Dr. Chevy to continue manipulation of HRT and offer that as an alternative to Appellant. However, it is clear that if Appellant decided not to have surgery, she would have remained on the HRT program in an attempt to reduce her bleeding and pain. Indeed, Dr. Chevy stated as much when he testified as follows:

> Q. If Ms. Stanley did not have the surgery, if she elected not to have the total abdominal hysterectomy, what would her continued course of treatment be?

A. She can either quit taking hormone or continue taking hormone and take the bleeding again.

Q. And you indicate here that the risk is continued bleeding. Correct?[5]

A Yes.

Q. She had been on hormone replacement therapy for roughly five years up to this point. Right?

A. Yes.

Dr. Chevy Trial Testimony, November 1, pg. 271.

Q. You told the jury in response to Mr. Robinson's questioning the risk of not having the surgery and either remaining on the hormone replacement therapy or going off the hormone therapy was that of bleeding. Correct?

A. Yes.

Dr. Chevy Trial Testimony, November 1, pg. 277.

Dr. March, the defense expert, testified that it is reasonable for a patient who does not elect to have surgery to stay on HRT. Dr. March stated as follows:

Q. She's on hormone replacement therapy and has been on it for five years. Right?

A. Yes, sir.

Q. And it's reasonable for the physician, if the patient doesn't want to have the surgery, to continue the hormone replacement therapy. Correct?

A. Yes, sir.

Dr. March Trial Testimony, November 2, pg. 154-155.

Dr. March further testified that he did not believe that Dr. Chevy deviated from the accepted standard of care regarding the HRT program for the Appellant as it related to the informed consent issue. Dr. March testified as follows:

[5] The informed consent form in question lists "continued bleeding" as a risk involved in not undergoing treatment, which would have been caused by the continued HRT treatment. *See Informed Consent Form*, attached as Exhibit 1.

Q. Do you agree with Dr. Dein that Dr. Chevy deviated or broke from the standard of care with respect to this issue on hormone replacement therapy?

A. Absolutely not.

Dr. March Trial Testimony, November 2, pg. 144.

Again, Dr. Chevy made clear to the jury that he discusses these issues with all of his surgical patients similarly situated as Appellant. Dr. Chevy also testified that Appellant would have continued on the HRT therapy had she declined to have surgery. The risk of continuing on the HRT therapy was continued bleeding which is noted on the informed consent form itself. The jury heard this evidence, as well as that of the Appellant, and decided in favor of Dr. Chevy.

C. Dr. Chevy Presented Evidence at Trial Establishing That He Obtained Informed Consent From Appellant and Acted Within the Standard of Care.

Evidence was presented at trial that, prior to the Appellant's surgery; she underwent HRT for approximately five years. This therapy was administered by both Rodney Stephens, M.D. (her prior ob/gyn physician) and, subsequently, Dr. Chevy. Although not an issue for the jury to decide, both Appellant's expert witness and Dr. Chevy's expert witness testified that they did not believe Dr. Chevy deviated from the accepted standard of care relating to the HRT regimen.

During the continued treatment of the Appellant by Dr. Chevy, a fibroid tumor was diagnosed on an ultrasound study of the Appellant's uterus ordered by Dr. Chevy prior to the surgery. *See* fn. 2 *supra*. As Appellant indicated in her trial testimony, because of the fibroid in the uterus, Dr. Chevy believed that it was the source of the bleeding. *Stanley Trial Testimony*, November 2, pg. 89. After discussing the results of the ultrasound study with Dr. Chevy, Appellant consented to have the surgery. Appellant testified as much at trial when she stated the following during direct examination:

Q. Maybe the question that's on everybody's mind is why did you agree to sign that document and then ultimately to submit to the total abdominal hysterectomy?

A. I was told I had a tumor.

Stanley Trial Testimony, November 2, pg. 95.

Throughout the entire trial, the jury was aware that Appellant had signed a consent form which explicitly discussed the risks of the surgery, the alternatives to surgery, and risks involved in not undergoing treatment. This consent was part of the stipulated medical records which the jury considered in its deliberations. The Appellant's expert testified that he had no criticisms of the form or contents of the consent document signed by both Dr. Chevy and Ms. Stanley. *See Dr. Dein Trial Testimony*, November 2, pg. 62-63.

Appellant admitted at trial that she read the document, understood the document, and signed the document based on her prior discussion with Dr. Chevy. Specifically, Appellant testified the following:

Q. And with respect to this consent form, you agree that you read the form. Correct?

A. Yes, I did.

Q. Now as I understand your testimony, your recollection is that you had a discussion with Dr. Chevy on June 3rd, but you came back in and signed this on June 19th. Correct?

A. Yes, true.

Q. And you read through this form. Correct?

A. Yes.

Q. And you signed this form on June 19th. Correct?

A. Yes. I understood that to be what we had talked about June 3rd.

Stanley Trial Testimony, November 2, pg. 124-125.

Furthermore, Dr. March, testifying on behalf of Dr. Chevy, stated that it was his expert opinion that Dr. Chevy provided proper informed consent to Appellant and that Dr. Chevy had acted within the standard of care. *Dr. March Trial Testimony*, November 2, pg. 156.

Contrary to Appellant's assertions, Judge O'Briant was entirely correct in his determination that Dr. Chevy had presented enough evidence at trial to create a factual dispute to be determined by a jury. This factual dispute between the two litigants was properly resolved by the jury after interpreting the conflicting views of the factual circumstances surrounding the case. The jury merely found the evidence presented by Dr. Chevy more compelling.

D. Appellant's Allegations of an "Admission" by Dr. Chevy are Incorrect.

Plaintiff's allegations that Dr. Chevy admitted never offering HRT therapy are false. At no point in the Appellant's Brief did the Appellant present any trial testimony that could be considered as such an admission. Most of the quotes offered by Appellant as "admissions" only relate to the fact that Dr. Chevy had no distinct recollection of a discussion he had with Appellant some seven years before his trial testimony. Specifically, Dr. Chevy's testimony quoted from pages 224-225, 238, and 280-281 of the November 1 trial transcript only describe Dr. Chevy's lack of recollection of the discussion regarding HRT. Simply put, he did not remember the discussion, and thus testified that his custom and practice in treating a patient like Appellant would be to discuss continuation of some aspect of HRT should she decline the TAH surgery. As previously stated, there are no criticisms of Dr. Chevy's decision to offer surgery or the management of Appellant's HRT program. The goal of Dr. Chevy's treatment was to prevent Appellant's vaginal bleeding.

Additionally, the trial testimony alleging to be an admission by Dr. Chevy and extracted from page 241 of the November 1, 2005 trial transcript is taken completely out of context. Specifically, the testimony is as follows:

> Q. The second page of the form, Dr. Chevy, I believe the first part, "we have also discussed alternative treatment methods and/or risks including vaginal route, risk as same as abdominal route." Is that what that says there?
>
> A. Yes.
>
> . . . .
>
> Q. Were there any, there's no other alternatives that I see. Are we missing anything else?
>
> A. No.

Dr. Chevy Trial Testimony, November 1, pg. 241.

However, if one were to read the testimony preceding the questioning cited above, one would quickly realize that Dr. Chevy was not admitting that there was only one alternative treatment method: Dr. Chevy was agreeing with plaintiff's counsel as to the language which appeared on the written consent form. Dr. Chevy unequivocally testified before the jury that he discusses alternative treatments which may not be fully set forth in the written form. Furthermore, Dr. March testified that the operative word in that passage of the consent document is the word "including," which does not mean "limited to." In other words, the list of alternative therapies was not exhaustive. *Dr. March's Trial Testimony*, November 2, pg. 160. Dr. Chevy made no such "admission" at any point during the trial.

E. The Instant Matter is Analogous to *Yates*; the Trial Court Properly Denied Plaintiff's Motion for Judgment as a Matter of Law; and this Court Should Uphold the Jury's Verdict.

This Court has historically favored supporting jury verdicts and will affirm a verdict, short of compelling reasons to set a verdict aside. In Syllabus Point 2 of *Stephens v. Bartlett*, 118 W.Va. 421, 191 S.E. 550 (1937), this Court held:

> An Appellate Court will not set aside the verdict of a jury, *founded on conflicting testimony and approved by the trial court*, unless the verdict is against the plain preponderance of the evidence.

(Emphasis added). Also, this Court stated as recently as 2004 in *In re Tobacco Litigation*, 215 W.Va. 476, 480, 600 S.E.2d 188, 192 (2004), that "[t]ypically, when a case has been determined by a jury, the questions of fact resolved by the jury will be accorded great deference."

This case is not one wherein egregious error entered the record or substantial justice was thwarted. The jury heard fully from the Appellant and Appellant's expert witness as well as Dr. Chevy and Dr. March. The trial testimony cited *supra* reflects the disparate evidence presented to the jury for its consideration. The unalterable fact is that two separate verdicts were rendered in favor of Dr. Chevy by two separate juries on distinguishable issues. These juries were properly empanelled and instructed. To reverse this second verdict for no other reason than a dispute as to the evidence adduced at trial–a dispute usually left to the good and proper judgment of the jury–serves to do nothing other than wrest the jury decision making process from the very members of the community who give their time and energies in arriving at such verdicts. Indeed, this jury deliberated[6] for approximately seven (7) hours on the sole issue of informed consent.

Just as in *Yates*, in light of the evidence and resolving all doubts and inferences in favor of the nonmoving party, one cannot believe that only one reasonable verdict was possible as

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[6] *The Oxford English Dictionary* (1993 Edition) defines "deliberate" as "to think carefully, pause for consideration, ponder; confer; take counsel together. Resolve, determine..."

Appellant claims. The jury was presented with ample evidence upon which to base its verdict. The consent form -- which contained information about the surgery's risks as well as alternatives -- coupled with Dr. Chevy's testimony regarding his routine discussions with patients who are candidates for the surgery supplied the evidence to support the defense verdict returned by the jury.

The matter at hand is analogous to *Yates* and this Court should conclude that there was sufficient factual evidence and expert testimony presented showing that treatment performed by the Appellant's physician was within the standard of care. Just as in *Yates*, the jury merely found the evidence presented by the defendant more credible, and concluded that Dr. Chevy was not negligent. Accordingly, the trial court was correct to deny Appellant's motion for a judgment as a matter of law at the end of evidence. This Court should allow the jury's verdict to stand and the Appellants request that an Order granting judgment as a matter of law should be denied.

III. A NEW TRIAL SHOULD NOT BE GRANTED ON THE ISSUE OF CAUSATION.

Appellant further argues that the causation issue in this case was never addressed by the jury. Pursuant to the agreed upon special jury interrogatories which where supplied by the jury to announce their verdict, a two prong question was proffered as to the determination of a verdict: first, whether Dr. Chevy deviated from the standard of care and, second, whether such deviation proximately caused damages to the plaintiff. The jury first must address the issue of standard of care pursuant to *West Virginia Code* § 55-7B-3. The jury's determination was that there was no deviation from the standard of care by Dr. Chevy. Thus, the jury did not address the proximate cause issue because Dr. Chevy had been found not liable. As such, any *perceived* error by the court in not granting plaintiff's motion as a matter of law on the issue of causation is simply harmless error, if any. "The court at every stage of the proceedings must disregard any

error or defect in the proceedings which do not affect the substantial rights of parties." See *McCallister v. Weirton Hospital Co.*, 312 S.E.2d 738 (W.Va. 1993). Also see Syl. Pt. 2, *Boggs v. Settle*, 145 S.E.2d 446 (W.Va. 1965) (holding that "[o]n an appeal of a case involving an action covered by the rules of civil procedure, this court will disregard and regard as harmless any error, defect or irregularity in the proceedings in the trial court which does not effect the substantial rights of the parties.")

CONCLUSION

For the foregoing reasons, the respondent, Suthipan Chevathanarat, M.D., respectfully requests this Honorable Court affirm the Circuit Court of Logan County's decision.

SUTHIPAN CHEVY, M.D.,
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CERTIFICATE OF SERVICE

This is to herby certify that on this 21st day of December, 2007, the undersigned have served a true and exact copy of the forgoing ***"BRIEF OF APPELLEE SUTHIPAN CHEVATHANARAT, M.D."*** via United States Mail, postage properly paid, upon the following:

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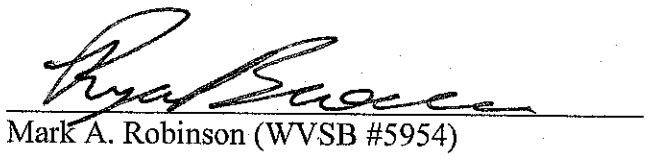

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